SYARIKAT PEMBINAAN LIDA SDN. BHD.

v.

TALASCO INSURANCE SDN. BHD.

SUPREME COURT, KUALA LUMPUR
TAN SRI DATUK GUNN CHIT TUAN CJ (MALAYA)
DATUK PEH SWEE CHIN SCJ,
DATUK EDGAR JOSEPH JR. SCJ,
[CIVIL APPEAL NO. 02-536-91]
30 MARCH 1993

INSURANCE LAW: Fire insurance policy - Policy expired - Purported renewal of earlier policy - Cover note issued to cover period of non-insurance retrospectively - Fire occuring during period of non-insurance - Whether insurance company liable.

The appellant had a fire insurance policy with the respondent which expired on 31 December 1981. On 9 February 1982, a fire occured causing some damage to the appellant's building materials and site office. On 10 February 1982, the Alor Setar Branch Manager of the respondent issued a cover note to the appellant in renewal of the earlier policy which purported to cover retrospectively the period from 1 January 1982 to 30 June 1982 for which the premium was paid on 11 February 1982.

The trial Court awarded the appellant RM25,000 as damages and the appellant appealed on the quantum of damages. The respondent cross-appealed on the issue of liability.

Held:

[1] Policies on insurance against fire are made on the implied condition that the description of the property inserted in the policy is true at the time of the making of the policy and where the policy is retrospective, the duty of disclosure applies not only to such facts as were material at the date from which the policy is to take effect, but also to all facts becoming material down to the actual date on which the contract is made.

[2] The appellant had failed to establish the basic fact that the wording of the policy afforded cover for the property concerned which was lost after the expiry of the old policy but prior to the issue of the cover note.

[3] The failure of the learned Judge to address himself on that basic issue was a misdirection by way of non-direction which had occasioned a miscarriage of justice for, if he had so directed himself, the inevitable conclusion would have been that the terms of that particular policy did not cover a situation where the subject matter may have been destroyed by fire prior to the date of effecting the renewal of the policy and there was no plea for rectification of the policy.

[Appeal dismissed with costs. Cross-appeal allowed with costs].

[**Bahasa Malaysia** Translation of Headnote]

UNDANG-UNDANG INSURANS: Polisi insurans kebakaran - Tempoh polisi tamat - Pembaharuan polisi yang dikatakan - Nota perlindungan dikeluarkan untuk melindungi tempoh kebelakangan yang tidak diinsuranskan - Kebakaran berlaku semasa tempoh tidak diinsuranskan - Sama ada syarikat insurans bertanggungjawab.

Perayu mempunyai polisi kebakaran dengan responden yang tamat tempohnya pada 31 Disember 1981. Pada 9 Februari 1982, satu kebakaran telah berlaku menyebabkan beberapa kerosakan kepada bangunan peralatan dan pejabat tapak perayu. Pada 10 Februari 1982, Pengurus Cawangan Alor Setar pihak responden telah mengeluarkan nota perlindungan kepada perayu dalam memperbaharui polisi sebelum ini yang dikatakan melindungi secara kebelakangan akan tempoh dari 1 Januari 1982 hingga Jun 1982 di mana premium baginya telah dibayar pada 11 Februari 1982.

Mahkamah perbicaraan telah mengawadkan RM25,000 kepada perayu sebagai ganti rugi dan perayu membuat rayuan berhubung dengan kuantum ganti rugi. Responden telah membuat rayuan balas ke atas isu keliabilitian.

Diputuskan:

[1] Polisi ke atas insurans terhadap kebakaran dibuat atas syarat tersirat bahawa butir-butir mengenai harta yang dicatitkan dalam polisi tersebut adalah benar pada waktu polisi itu dibuat dan di mana polisi berkenaan dibelakangkan, kewajipan penzahiran bukan sahaja terhad kepada fakta-fakta sedemikian sebagaimana yang berkenaan pada tarikh mulai mana polisi tersebut berkuatkuasa,

tetapi juga merangkumi segala fakta yang menjadi keberkenaan sehinggan kepada tarikh sebenar di mana kontrak itu dibuat.

[2] Perayu gagal membuktikan fakta asas bahawa perkataan polisi terseut memperuntukkan perlindungan bagi harta berkenaan yang telah luput selepas tamatnya tempoh polisi lama tetapi sebelum daripada pengeluaran nota perlindungan.

[3] Tuan Hakim yang bijaksana gagal melihat kepada isu asas dan ini merupakan suatu salah-arah (misdirection) secara tidak mengarahkan (non-direction) yang membawa kepada ketidakadilan kerana, jika beliau telah mengarahkan diri beliau sedemikian, kesimpulan yang tidak dapat dielakkan tentulah bahawa terma-terma polisi tersebut tidak melindungi keadaan di mana hal perkara berkenaan telah dimusnahkan oleh kebakaran terdahulu daripada tarikh penguatkuasaaan pembaharuan polisi tersebut dan tiada sebarang rayuan untuk memperbetulkan polisi itu.

[Rayuan ditolak dengan kos. Rayuan balas dibenarkan dengan kos].

Cases referred to:
Silem v. Thornton [1854] 3 E & B 868 ***(refd)***
Bradford v. Symondson [1881] 7 QBD 456 @ 461 ***(refd)***
Pritchard v. Merchants' and Tradesmen's Life Assurance Society [1858] 3 CBNS 622 ***(refd)***

Other sources referred to:
Spencer Bower on Actionable Non Disclosure, p. 97

For the appellant - C.K. Lee; M/s. C.K. Lee & Associates
For the respondent - Chandra Kanagasabai (A. Kumar with her); M/s. Hazzan & Fadzil

JUDGMENT

Gunn Chit Tuan CJ (Malaya):
Syarikat Pembinaan Lida Sdn. Bhd. ("the appellant") had appealed against the inadequacy of the sum of RM25,000 awarded to it by the High Court under a fire insurance policy issued by Talasco Insurance Sdn. Bhd. ("the respondent"). The respondent, in turn, had cross-appealed against the whole of the decision of the High Court including the award of RM25,000 on the ground, *inter alia*, that it should not have been held liable at all as the insurer. We dismissed the appeal of the appellant and allowed the cross-appeal of the respondent and now give our reasons for our decision.

The said sum of RM25,000 was awarded in pursuance of the said fire insurance policy issued by the respondent to the appellant to cover damage from fire at Bukit Mertajam in respect of "building in course of construction" and "building materials and site office" in connection with the business and work of the appellant as building contractor for a housing developer called Duniaga Sdn. Bhd.

The said fire insurance policy under which the award of RM25,000 was given was a renewal of a similar fire policy which had expired on 31 December 1981. When that policy expired on 31 December 1981, it was not renewed at or before the time of its expiry. Then on 9 February 1982, a fire, which was a risk which would have been covered by the earlier policy if it had been validly renewed for another year on or before 31 December 1981, occurred causing some damage to the appellant's building materials and site office.

On 10 February 1982 the branch manager of the respondent insurer at Alor Setar, one Abdul Salam bin Pani, issued a cover note to the appellant and premium was then paid on 11 February 1982. It is to be noted that the cover note thus issued in renewal of the earlier policy purported to cover retrospectively the period from 1 January 1982 to 30 June 1982, thus covering the fire and the consequential damage in question retrospectively. The learned Judge on the evidence adduced before him came to the finding that "On the facts before me, I find that there are ample evidence to show that Salam knew of the fire before he issued the cover note on behalf of Talasco...". However, with respect, we found that the learned Judge had erred when he also stated that Salam was authorised to issue the cover note to cover the risk and concluded that the respondent was liable on the claim. We agreed with the main thrust of the argument advanced by Counsel for the respondent that the learned Judge was wrong in law in holding that the respondent was liable under the cover note dated and issued on 10 February 1982, which purported to effect renewal of the earlier policy of insurance which had expired on 31 December 1981, and which cover note on the

fact of it afforded cover to the appellant from 1 January 1982 to 31 June 1982 although the fire had occurred on 9 February 1982.

It must be noted that at the time of the issue of that cover note, there was already no property to insure nor any policy in force. It must also be remembered that contracts of insurance, like wagering contracts, are aleatory contracts and that being so it is considered by the world that "betting on a certainty renders the wager invalid". (See p. 97, **Spencer Bower on Actionable Non Disclosure).**

Policies on insurance against fire are made on the implied condition that the description of the property inserted in the policy is true at the time of the making of the policy (*Silem v. Thornton* [1854] 3 E & B 868) and where the policy is retrospective, the duty of disclosure applied not only to such facts as were material at the date from which the policy is to take effect, but also to all facts becoming material down to the actual date on which the contract is made. The position of the case in the present appeal is that there was in fact no property to insure at the date of the issue of the cover note purporting to renew the old fire insurance policy.

Although the subject matter had been destroyed by fire at the date of effecting the purported renewal of the insurance, the contract may nevertheless, in some cases, be valid and operate to indemnify the assured notwithstanding the destruction of the subject matter because there is no objection in principle to a retrospective insurance, provided that the insured had in fact at the date of the loss an insurable interest. As stated by Brett LJ. in *Bradford v. Symondson* [1881] 7 QBD 456 at 461 who, after referring to policies on ships, "lost or not lost" continued:

> indeed the decisions, or at all events the dicta of Lord Mansfield and others of the greatest insurance Judges in England, have gone as far as this, that if both parties knew that the subject-matter was lost at the time when they entered into the policy, and the policy in terms covers that loss, the policy is good.

Nevertheless it must be **clear** from the wording of the policy that such was the intention of the parties; if this cannot be demonstrated the policy is void and the premium must be returned (*Pritchard v. Merchants' and Tradesment's Life Assurance Society* [1858] 3 CBNS 622).

In this case the appellant had failed to establish the basic fact that the wording of the policy afforded cover for the property concerned which was lost after the expiry of the old policy but prior to the issue of the cover note, assuming it had informed the respondent of the fire prior to the issue of the cover note. As it had failed to do so, the appellant's claim had to be dismissed. The failure of the learned Judge to address himself on that basic issue was a misdirection by way of non-direction which had occasioned a miscarriage of justice for, if he had so directed himself, the inevitable conclusion would have been that the terms of that particular policy did not cover a situation where the subject matter may have been destroyed by fire prior to the date of effecting the renewal of the insurance and there was no plea for rectification of the policy. In short, therefore, the respondent, as the insurer, was not liable because the cover note had not attached at all by reason of the fact that at the time of its issue, the risk had determined and there was no insurable interest to insure and the terms of the policy in this case did not cover such a situation.

For the above reasons, we therefore ordered that the cross-appeal of the respondent be allowed and the appeal of the appellant be dismissed with costs here and below with the deposit in Court to be paid out to the respondent on account of taxed costs.